

STATE OF MICHIGAN
COURT OF APPEALS

PAUL HUIZINGH,

Plaintiff-Appellant,

v

ALLSTATE INSURANCE COMPANY,

Defendant-Appellee.

UNPUBLISHED

April 29, 2003

No. 233698

Kent Circuit Court

LC No. 00-011254-NF

Before: Whitbeck, C.J., and Cavanagh and Bandstra, JJ.

WHITBECK, C.J. (*concurring*).

I fully agree with the majority's conclusion that the default should be reinstated. I concur only to note that I believe the trial court's decision to set aside the default should have been reviewed for an abuse of discretion.¹ Although this Court has reviewed de novo a trial court's decision respecting a default, it has done so only where the trial court mistakenly believed it had no discretion to exercise, but rather was compelled to enter a default.² Where the trial court was aware it had discretion respecting a default ruling, this Court has refused to subject its decision to de novo review.³

In this case, there was no indication that the trial court was under any misapprehension respecting its authority to exercise discretion. The record shows that the trial court articulated, and purported to base its ruling on, the proper test. The record further indicates that the trial court's application of this test did not occur entirely in a vacuum. Allstate argued that it had met the good cause requirement by offering two meritorious defenses that justified applying a "lesser standard of good cause," which it claimed to have met by showing that the default was improperly entered because it had filed a timely appearance.

Regardless of the dubious merit and applicability of this argument, the trial court's determination respecting its adequacy is, in my view, an exercise of discretion. Because I believe that the trial court abused its discretion by concluding that Allstate's argument was

¹ See *Alken-Ziegler, Inc v Waterbury Headers Corp*, 461 Mich 219, 227; 600 NW2d 638 (1999).

² See *Kowalski v Fiutowski*, 247 Mich App 156, 166; 635 NW2d 502 (2001).

³ See *Roberts & Son Contracting, Inc v North Oakland Dev Corp*, 163 Mich App 109, 112; 413 NW2d 744 (1987).

adequate to satisfy the good cause requirement, however, I agree that the trial court's decision should be reversed and remanded for reinstatement of the default.

/s/ William C. Whitbeck